

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 09 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEFFREY DUANE HEIN,

Defendant - Appellant.

No. 05-30489

D.C. No. CR-05-00080-JLR

AMENDED MEMORANDUM^{*}

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted June 6, 2006
Seattle, Washington

Before: TALLMAN and BYBEE, Circuit Judges, and HUFF^{**}, District Judge.

The district court properly concluded that Detective Moore's redacted affidavit established probable cause. Deweerdt's criminal history, and the facts contained within her written statement, were not material and their omission did

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The Honorable Marilyn L. Huff, United States District Judge for the Southern District of California, sitting by designation.

not mislead the magistrate into finding probable cause. *See United States v. Garza*, 980 F.2d 546, 551 (9th Cir. 1992) (“Only if omitted facts cast doubt on the existence of probable cause do they rise to the level of misrepresentation.” (internal quotation marks omitted)). Considering all of the circumstances surrounding the incident, and the corroborating evidence at the crime scene, there was still sufficient evidence to establish probable cause even had the omitted facts been included. *See Illinois v. Gates*, 462 U.S. 213, 230 (1983) (stating that probable cause is determined by examining the totality of the circumstances).

Although the evidence suggests that Detective Moore (who drafted the request for a search warrant) did not know of the illegal search and its fruits, the record also suggests that Moore sought the warrant at the request of investigating officers who did have such knowledge. This case must be remanded under *Murray v. United States*, 487 U.S. 533, 542-43 (1988), so that the district court may determine whether, had the illegal search not been conducted, the police department would have nevertheless sought a warrant. *See United States v. Duran-Orozco*, 192 F.3d 1277, 1281 (9th Cir. 1999) (stating that the district court must make an explicit finding as to whether the agents had an independent source to seek the search warrant).

AFFIRMED IN PART and REMANDED.